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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ANDREW ROLFES, Plaintiff and Appellant, v. RONALD F. MEI, Defendant and Appellant.	B266929 (Los Angeles County Super. Ct. No. SC121368)

APPEAL from a judgment of the Superior Court of Los Angeles County. Lisa Hart Cole, Judge. Affirmed, as modified.

Kenneth F. Moss for Plaintiff and Appellant.

Henry J. Josefsberg for Defendant and Appellant.

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The owner of an apartment complex hired the plaintiff to be the complex's live-in assistant manager, and eventually, its manager. Instead of paying wages, the owner gave the plaintiff a credit against his rent. After the plaintiff moved out, he sued the owner for violations of the minimum wage law, for not giving him check stubs, for not returning his security deposit, and for injuries he suffered when he got into a fistfight with a trespasser while on a safety patrol of the complex. The trial court ruled for the plaintiff in a bench trial. The owner appeals everything but the security deposit ruling, and the plaintiff cross-appeals the court's refusal to award prejudgment interest on the minimum wage violation. The plaintiff's cross-appeal has merit; the owner's appeal does not. We accordingly affirm, but modify the judgment to award prejudgment interest.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

Because we review factual challenges to the trial court's ruling for substantial evidence, we recount the facts in the light most favorable to that ruling. (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052.)

Defendant Ronald F. Mei (owner) owns a 33-unit apartment complex on North McCadden Place in Hollywood, California. The complex is not in a great neighborhood. Transients and others use the complex's shaded front steps on a "daily" basis to smoke drugs, to drink, and to have sex. Because locks on the complex's gates are often in disrepair and because there are gaps in the security spikes atop those gates, transients and others "frequently" get inside the complex.

In mid-2000, the complex's apartment manager—with the owner's subsequent approval—hired plaintiff Andrew Rolfes (plaintiff) to be the complex's assistant manager. The manager told plaintiff his duties would involve cleaning the complex's common area as well as the messes left on the outside steps, and fielding complaints from the complex's residents. For this, plaintiff was to receive a $200 credit off of his monthly rent of $675. The sole memorialization of this arrangement was the first page of a standard form "Apartment House Lease" that granted plaintiff a one-year lease for $675 per month, with a handwritten and initialed notation: "$200.00 off for Assit [*sic*] manager duties. Making it $475.00." The lease also called for a $540

security deposit. Although the standard form also had pages two and three, these were never part of plaintiff's lease.[1]

In mid-2005, the owner asked plaintiff to become the complex's manager. In exchange, plaintiff was no longer required to pay any rent for his apartment. This agreement was never reduced to writing: Plaintiff said the owner told him to "forget about the lease . . . from now on," and the owner himself acknowledged that he has "verbal agreement[s]" with his "managers." Plaintiff spent 6.5 to 11.6 hours per week on his managerial duties.

In September 2010, plaintiff encountered a trespasser inside the complex. As plaintiff was escorting him out of the complex, the trespasser turned and threw a punch at plaintiff. Plaintiff swung back but missed, and in so doing hyper-extended his arm. The trespasser fled, but plaintiff's injury caused him "pretty severe" pain and required bicep tendon surgery. While in recovery, plaintiff reinjured his arm moving a sofa, which required a second surgery. The two surgeries cost $21,462.30. The owner did not have workers' compensation insurance, so plaintiff's personal health insurance covered all but the $100 copayment for each surgery; plaintiff paid the $200 in copayments himself.

Plaintiff resigned as apartment manager and moved out in mid-2013. The owner did not refund his security deposit or explain why it was not refunded.

II. Procedural Background

Soon after he moved out, plaintiff sued the owner for (1) breach of the minimum wage law, seeking actual and liquidated damages (Lab. Code, §§ 1194 & 1194.2)[2]; (2) breach of the duty to provide paycheck stubs (§ 226), seeking statutory penalties; (3) misclassifying him as an independent

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1 The owner inconsistently testified as to whether pages two and three were part of plaintiff's lease, and testified that he gave plaintiff a handwritten list of assistant manager duties in 2000. However, the trial court found the owner not to be a credible witness and the handwritten list to be an after-the-fact fabrication.

2 All further statutory references are to the Labor Code unless otherwise indicated.

contractor, seeking nominal damages; (4) unfair business practices (Bus. & Prof. Code, § 17200); (5) failure to return his security deposit, seeking a refund and statutory penalties (Civ. Code, § 1950.5); and (6) negligence in not maintaining safe premises, seeking damages for his September 2010 injuries (§§ 3706 & 3708).

The owner cross-claimed against plaintiff for breach of contract, seeking $80,960 in back rent from 2005 through 2013.

Following a four-day bench trial, the trial court issued a 15-page statement of decision addressing 12 issues.

The trial court concluded that the owner had breached the minimum wage law and awarded plaintiff $7,904 in unpaid wages, calculated as $8 per hour, for 6.5 hours per week, for the 35 months still within the three-year statute of limitations. The court rejected the owner's several arguments to the contrary. The owner argued that plaintiff had never been promoted from assistant manager to manager, but the court found the owner's testimony and other evidence on this point "self-serving and unsubstantiated." The owner also argued that plaintiff had been compensated via the rent credit pursuant to Industrial Welfare Commission wage order No. 5-2001 (Cal. Code Regs., tit. 8, § 11050), but the court noted that wage order No. 5-2001 only authorizes such an offset pursuant to a "voluntary written agreement" and found that no such written agreement existed here because the form lease partially filled out in 2000 (1) was "incomplete and unsigned," (2) was "a lease, not an employment agreement," (3) was by its own terms only a one-year agreement, and (4) did "not address the terms of employment compensation for a *manager*." (Italics added.) What is more, because the owner had been in the business of owning apartments for decades and had made no effort to learn the wage and hour laws applicable to his apartment managers, the court concluded that the owner's violation was not in good faith and thus warranted liquidated damages in the same amount as actual damages. The court declined to award prejudgment interest on the actual damages, finding it to be "duplicative" of the liquidated damages. The court also concluded that the minimum wage violation constituted an unfair business practice, and awarded one additional year of minimum wages—that

is, $2,704—on this claim due to the four-year statute of limitations under Business and Professions Code section 17200.

The court next concluded that the owner had violated the law requiring the issuance of check stubs, and awarded $2,550 in statutory penalties. The court rejected the owner's argument that the statutory exception set forth in section 226, subdivision (d) applied to residential apartment managers.

The trial court further concluded that plaintiff was entitled to $200 in economic damages and $20,000 for pain and suffering arising from the injury he sustained in September 2010.[3] Specifically, the court found that plaintiff sustained the injury "within the course and scope of [his] employment"; that the owner's negligence was statutorily presumed under section 3708; and that the owner had not rebutted the presumption in light of the evidence of the complex's locks and gates being in disrepair. The court rejected, as "without merit," the owner's argument that plaintiff had failed to mitigate his damages when he reinjured himself moving the sofa.

The court ruled against the owner on his cross-claim for back rent, finding that no "reasonable landlord or business owner" would allow a tenant to remain in an apartment for eight-plus years without paying rent if rent were truly due and owing.

After awarding plaintiff an additional $1,620 in damages on his security deposit claim but no additional damages on the misclassification claim, the court entered judgment for plaintiff in the amount of $42,882.

The owner filed a timely appeal, and plaintiff filed a timely cross-appeal.

DISCUSSION

The owner levels two types of challenges to the trial court's ruling. Procedurally, he argues that the court's statement of decision is defective. Substantively, he contends that the court erred in (1) finding that he violated the minimum wage law, (2) finding that he violated the check stub law, and (3) awarding damages to plaintiff on the negligence claim. In the cross-

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3 The court found that the owner had waived the statute of limitations defense on the negligence claim by failing to plead it in his operative answer. The owner does not challenge this ruling on appeal.

appeal, plaintiff asserts that the court was statutorily required to award prejudgment interest on his actual minimum wage damages.

I. The Owner's Appeal

A. Procedural challenge to the statement of decision

Citing *Espinoza v. Calva* (2008) 169 Cal.App.4th 1393, 1397-1398 (*Espinoza*), the owner argues that he is automatically entitled to a reversal because the trial court's statement of decision is defective in that it does not respond to every single one of the 10 issues he identified in his opening posttrial brief, the 15 issues he identified in his closing posttrial brief, or the three issues he identified in his objections to the proposed statement of decision.

We reject this argument for two reasons. First, the automatic reversal rule set forth in *Espinoza* applies when a trial court does not issue a statement of decision *at all* despite a timely request to do so. (See *Espinoza*, *supra*, 169 Cal.App.4th at pp. 1397-1398; *In re Marriage of S.* (1985) 171 Cal.App.3d 738, 746-749; accord, *Miramar Hotel Corp. v. Frank B. Hall & Co.* (1985) 163 Cal.App.3d 1126, 1129 [court declared its minute order to be a "statement of decision"]; *Social Service Union v. County of Monterey* (1989) 208 Cal.App.3d 676, 679 [court declared its oral ruling to be a "statement of decision"].) The continued validity of this rule is currently pending before our Supreme Court. (See *F.P. v. Monier* (2014) 222 Cal.App.4th 1087, review granted Apr. 16, 2014, S216566.) Regardless of how that case is resolved, the automatic reversal rule does not apply in this case because the trial court issued a 15-page written statement of decision.

Second, the trial court's statement of decision is not deficient. When requested to do so in a timely manner, a trial court is required to "issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial . . ." (Code Civ. Proc., § 632.) A statement of decision is sufficient as long as it "dispose[s] of all basic issues and fairly disclose[s] the court's determination as to ultimate facts and material issues in the case." (*Duarte Nursery, Inc. v. California Grape Rootstock Improvement Com.* (2015) 239 Cal.App.4th 1000, 1012.) Importantly, the statement need not "respond point by point to issues posed in a request for a statement of decision." (*Pannu v. Land Rover North*

America, Inc. (2011) 191 Cal.App.4th 1298, 1314, fn. 12.) The trial court's statement of decision resolved every issue pertinent to the case pending before it. As a result, the owner's complaint on appeal that the statement did not respond, point by point, to every single one of the 28 issues he identified in his various filings provides no basis for reversal.

B. Substantive challenges

1. Violation of minimum wage law

Our Legislature has granted any employee who has "receiv[ed] less than the legal minimum wage" the right to "recover in a civil action" both (1) "the unpaid balance of the full amount of this minimum wage . . ., including interest thereon"; and, unless the employer's failure to pay was made reasonably and in "good faith," (2) "liquidated damages in an amount equal to the wages unlawfully unpaid and interest thereon." (§§ 1194, subd. (a) & 1194.2, subds. (a) & (b).) This mandate is not without exceptions. As pertinent here, wage order No. 5-2001 empowers the employer of a residential apartment manager to meet "part of [its] minimum wage obligation" by giving the manager a rent reduction (which cannot exceed $381.20 per month), but only if there is a "voluntary written agreement" to that effect "between the employer and the employee." (Cal. Code Regs., tit. 8, § 11050, subd. 10(C); *Von Nothdurft v. Steck* (2014) 227 Cal.App.4th 524, 530 (*Van Nothdurft*) [applying wage order No. 5-2001 to residential apartment managers]; *Brock v. Carrion, Ltd.* (E.D.Cal. 2004) 332 F.Supp.2d 1320, 1328 [same].)[4]

The owner challenges the trial court's ruling that the exception contained in wage order No. 5-2001 does not apply to his arrangement with plaintiff. To the extent his challenge turns on the meaning of wage order No. 5-2001 or other statutes, our review is de novo. (*Kilby v. CVS Pharmacy, Inc.*

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4 Alternatively, an employer-landlord may charge its residential apartment manager rent of "up to two-thirds of the fair market rental value" as long as there is a "voluntary written agreement" so providing. (§ 1182.8.) This alternative does not apply if, as was the case here, "credit for the apartment is used to meet the employer's minimum wage obligation to the manager." (*Ibid.*)

(2016) 63 Cal.4th 1, 11.) To the extent his challenge attacks the trial court's factual findings set forth in the statement of decision, we review for substantial evidence and in so doing review the record in the light most favorable to the court's ruling, draw all reasonable inferences to support that ruling, and accept the court's credibility findings. (*Tribeca Companies, LLC v. First American Title Ins. Co.* (2015) 239 Cal.App.4th 1088, 1102.)

We conclude that the trial court correctly determined that there was no "voluntary written agreement" between the owner and plaintiff that authorized the owner to apply a credit against plaintiff's rent in lieu of part of the minimum wage plaintiff was owed. The sole writing produced here is the first page of the standard form Apartment House Lease that plaintiff and the owner's agent filled out in 2000 for a one-year term. Its sole reference to plaintiff's employment as assistant manager is a handwritten scribble indicating that plaintiff would receive a $200 rent credit for being assistant manager. The writing does not speak to any other terms or conditions of his employment as assistant manager or to his duties as assistant manager. Critically, this agreement says *nothing* about plaintiff's employment as the complex's manager, *nothing* about the conditions or duties of that new and different job, and *nothing* about the full rent credit he would receive (which ranged anywhere from $850 to $1095 per month).

Consequently, there was no "voluntary written agreement" memorializing the parties' agreement that, as apartment manager, plaintiff was to receive a full rent credit in lieu of the minimum wage.[5] Absent such

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5 In light of this conclusion, we have no occasion to reach the further, legal issue of whether a "voluntary written agreement" is only valid if it expressly refers to the fact that any rent credit is in lieu of minimum wages. (Compare Cal. Dept. of Industrial Relations, Division of Labor Standards Enforcement Policies and Interpretations Manual (Updated Mar. 2010) § 45.4.5 <http://www.dir.ca.gov/dlse/manual-instructions.htm> [as of Nov. 18, 2016] [requiring such a reference] with *Van Nothdurft*, *supra*, 227 Cal.App.4th at p. 532 [not requiring such a reference]).

We also have no occasion to discuss the impact of the fact that the credit given exceeds the maximum credit permitted by wage order No. 5-2001.

an agreement, the owner was obligated to pay the minimum wage. This justifies plaintiff's recovery of unpaid minimum wages within the three-year limitations period of the Labor Code, of liquidated damages in the same amount (because the owner does not on appeal challenge the trial court's finding of lack of good faith), and of an additional year of back wages due to the four-year limitations period under Business and Professions Code section 17200.

The owner raises several arguments in response.

First, the owner argues that the 2005 oral contract between himself and plaintiff is an iteration of the written 2000 Apartment House Lease because, under contract law, "[a] contract in writing may be modified by an oral agreement to the extent that the oral agreement is executed by the parties" (Civ. Code, § 1698, subd. (b)). What is more, the owner asserts, the parties' 2005 oral modification left the 2000 Apartment House Lease intact because it did not effect a novation of the 2000 Apartment House Lease (Civ. Code, §§ 1530-1532; *Eluschuk v. Chemical Engineers Termite Control, Inc.* (1966) 246 Cal.App.2d 463, 468); did not constitute a release from the 2000 Apartment House Lease (Civ. Code, § 1541); and did not rescind the 2000 Apartment House Lease, as plaintiff never returned the consideration he received under the 2000 agreement by paying back the five years of rent reduction he had received (Civ. Code, § 1689; *Neet v. Holmes* (1944) 25 Cal.2d 447, 459 [requirements for rescission]). However, all of these arguments—and the doctrines of contract law on which they rely—establish, at most, that the 2005 oral agreement between the owner and plaintiff was a valid and enforceable contract. But the enforceability of the contract says nothing about whether, under wage order No. 5-2001, there was a "voluntary written agreement" between the owner and plaintiff that excused the owner from his statutory duties to pay the minimum wage. The owner makes the related argument that the 2000 Apartment House Lease nevertheless entitles him to a $200 monthly *credit* against the minimum wage. It does not, chiefly because a "voluntary written agreement" cannot be cobbled together from snippets of prior agreements, particularly where—as here—the prior agreement involved a different job with different duties for different pay.

Second, the owner contends that plaintiff, by his conduct, implicitly waived the protections of wage order No. 5-2001. He did not because he *cannot*. Although "'[a]nyone may waive the advantage of a law intended solely for his benefit[,] . . . a law established for a public reason cannot be contravened by a private agreement.' [Citation.]" (*Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1131 (*Sonic*).) "The provisions of the Labor Code, particularly those directed toward the payment of wages to employees entitled to be paid, were established to protect the workers and hence have a public purpose." (*Ibid.*) As a result, plaintiff cannot waive his right to the protections of the minimum wage law. (Accord, § 432.5 ["[n]o employer . . . shall require any employee . . . to agree, in writing, to any term or condition which is known by such employer . . . to be prohibited by law"].) The owner cites several cases, claiming they set forth a contrary rule. They do not. (See *City of Oakland v. Hassey* (2008) 163 Cal.App.4th 1477, 1500 [discussing section 1126, which allows for some Labor Code protections to be negotiated as part of collective bargaining]; *Mendoza v. Nordstrom, Inc.* (C.D.Cal. Sept. 21, 2012, No. SACV 10-00109-CJC (MLGx)) 2012 U.S.Dist.Lexis 188379, at pp. 15-16 [providing that employees may choose to disregard the right to work no more than six consecutive days under sections 551 and 552], review pending (9th Cir. 2015) 778 F.3d 834, 837 [certifying three questions to California Supreme Court]; *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1040-1041 [holding that employers must grant meal and rest breaks, but are not obligated to "police" employees to make sure they do not work during those breaks].)

Third, the owner contends that the 2005 oral agreement would be valid under the statute of frauds because the 2000 Apartment House Lease constitutes a "writing" within the meaning of section 8 of the Labor Code and because fully executed contracts (such as the apartment manager contract that ended in 2013) are exempt from the statute of frauds (*McGlasson v. Blythe* (1956) 143 Cal.App.2d 152, 156; *Schaefer v. United Bank & Trust Co.* (1930) 104 Cal.App. 635, 646). As explained above, however, whether the 2005 oral agreement is enforceable—whether under contract principles or under the statute of frauds—is irrelevant to the question of whether it constitutes a "voluntary written agreement" within the meaning of wage

order No. 5-2001. And although the writing requirement in wage order No. 5-2001 undoubtedly shares some of the same policy justifications as the statute of frauds (that is, preventing fraudulent claims), we will not import exceptions to the latter into the former because wage order No. 5-2001—unlike the statute of frauds—is imbued with the further public purpose of protecting employees. (See *Sonic*, *supra*, 57 Cal.4th at p. 1131.)

Finally, the owner makes a number of other arguments that defy categorization. He argues that rent is one of the "necessaries of life" under section 213. But sections 212 and 213 address when an employer can essentially issue an "IOU" for a paycheck (§§ 212 & 213); they are irrelevant here. The owner also argues that the law recognizes "holdover tenants" (Civ. Code, § 1945; Code Civ. Proc., § 827, subd. (a)), and thus should recognize a "holdover" employment contract when the employee is also a tenant (see *Conner v. Garrett* (1924) 65 Cal.App. 661, 664-665 [person who took possession of property for mining purposes; contract may be viewed as a lease or an employment contract, and may be treated as a "holdover" contract]). But the duration of plaintiff's tenancy is irrelevant to his wage claim and, even if *Conner* is extended to this very different situation, it addresses at most the continued enforceability of the 2005 agreement—not whether it is a "voluntary written agreement" under wage order No. 5-2001. Citing *Feeney v. Clapp* (1932) 126 Cal.App. 729, 733-734, the owner finally argues that plaintiff, like any tenant, is estopped to deny the arrangement he made once he has accepted its benefits. But the issue here is not the validity of plaintiff's lease. Moreover, if an employee cannot prospectively waive his statutory right to receive the minimum wage by an agreement, he cannot waive it retrospectively by estoppel.

2. Violation of check stub law

With "each payment of wages," an employer is required to "furnish" "an accurate itemized statement in writing" showing, among other things, hours worked, gross wages, deductions, and net wages earned. (§ 226, subd. (a).) If the employer "knowing[ly] and intentional[ly]" fails to do so, his employee can sue to recover the greater of actual damages or statutory penalties of $50 for the initial pay period and $100 for each subsequent pay period (up to a total of $4,000). (§ 226, subd. (e)(1).) This requirement does not apply to the

"employer of [1] any person employed by the owner or occupant of a residential dwelling [2a] whose duties are incidental to the ownership, maintenance, or use of the dwelling, including the care and supervision of children, or [2b] whose duties are personal and not in the course of the trade, business, profession, or occupation of the owner or occupant." (§ 226, subd. (d).)

The owner argues that he falls within the exception in section 226, subdivision (d). We independently review the trial court's interpretation of this subdivision (*Nichols v. Century West, LLC* (2016) 2 Cal.App.5th 604, 611-612 (*Nichols*)), and review for substantial evidence any factual findings (*Coffey v. Shiomoto* (2015) 60 Cal.4th 1198, 1217 (*Coffey*)).

We agree with the trial court that plaintiff does not fall within section 226, subdivision (d)'s exception to the check stub requirement. It is not clear whether plaintiff satisfies the first requirement. Although plaintiff was employed by the person who owns the apartment complex, it is unclear whether the complex's apartments *as a whole* constitute a "residential dwelling." We will nevertheless assume that plaintiff meets this requirement. Plaintiff does not meet the second prong of the second requirement because his duties as the manager of the apartment complex *are* "in the course of the trade, business, profession, or occupation of the owner" because the owner freely admits he is in the business of owning apartments. Thus, the applicability of this exception comes down to whether plaintiff's duties as manager of the complex "are incidental to the ownership, maintenance, or use of the dwelling, including the care and supervision of children." (§ 226, subd. (d).)

Although the text of this provision does not on its face foreclose the conclusion that an apartment manger's duties are "incidental to the ownership, maintenance, or use of" the apartment complex, we conclude that the exception is meant to reach only casual labor hired by individual homeowners or renters—not apartment managers hired by apartment complex owners. We reach this conclusion for three reasons. First, the text of the exception gives a specific example of what constitutes duties "incidental to the ownership, maintenance, or use of the dwelling"—namely, babysitting. Where, as here, a statute spells out in specific terms what it

means by general terms, "'the general words are limited to those items that are similar to those specifically listed.'" (*Sterling Park, L.P. v. City of Palo Alto* (2013) 57 Cal.4th 1193, 1202, quoting *Clark v. Superior Court* (2010) 50 Cal.4th 605, 614.) This counsels in favor of construing the duties covered by the exception to those akin to babysitting. Second, the legislative history regarding the enactment of this language dovetails perfectly with this construction because it specifically indicates that the exception in section 226, subdivision (d) was meant to exempt "household employees" and "casual labor hired by a homeowner or renter, such as babysitters, gardeners, and domestic workers."[6] (See *John v. Superior Court* (2016) 63 Cal.4th 91, 95-96 [courts may look to "extrinsic aids, including legislative history," when construing statutes].) Lastly, identical language in section 3351, subdivision (d), has been interpreted to refer to "casual household employees." (*State Farm Fire & Casualty Co. v. Workers' Comp. Appeals Bd.* (1997) 16 Cal.4th 1187, 1195-1196; see generally *Chandis Securities Co. v. City of Dana Point* (1996) 52 Cal.App.4th 475, 486 ["identical words in different parts of the same act or in different statutes relating to the same subject matter are construed as having the same meaning"].) Because plaintiff is neither a "household employee" nor "casual labor" hired by a homeowner or an individual renter, he falls outside section 226, subdivision (d)'s exception.

The owner raises what boils down to three objections to this conclusion.

First, he argues that three other cases have come to a contrary conclusion in interpreting section 3351, subdivision (d)'s identical language—namely, *Cedillo v. Workers' Comp. Appeals Bd.* (2003) 106 Cal.App.4th 227, *Stewart v. Workers' Comp. Appeals Bd.* (1985) 172 Cal.App.3d 351, and *Scott v. Workers' Comp. Appeals Bd.* (1981) 122 Cal.App.3d 979. We disagree. Both *Cedillo* and *Stewart* held that a carpenter and a "handyman" hired by an individual homeowner, respectively, fell within this language (*Cedillo*, at p. 235; *Stewart*, at pp. 353, 355-356), while *Scott* held that a carpenter hired to *build* a home did not (*Scott*, at pp. 981-982). These cases consistently looked to whether the person was "casual labor" hired by a homeowner, and

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6 We previously granted plaintiff's motion to take judicial notice of this legislative history. (Evid. Code, §§ 452 & 459.)

do not support the owner's broad assertion that a person employed by an apartment owner to manage the complex qualifies as such.

Second, the owner asserts that the legislative history of section 226, subdivision (d) supports his reading because the subdivision initially cross-referenced section 3351, subdivision (d), but was later amended to delete the cross-reference and instead insert just a portion of section 3351, subdivision (d)'s language. This is true, but it does not aid the owner because that portion of section 3351, subdivision (d), as noted above, reaches only "casual labor"—not persons assisting a property owner in his commercial rental of that property.

Lastly, the owner notes that plaintiff never proved any actual damages from the lack of check stubs. This is irrelevant because, even in the absence of actual damages, plaintiff was entitled to statutory penalties. (§ 226, subd. (e)(1).) That is all the trial court in this case assessed.

3. Personal injury damages

Where an employer does not have workers' compensation coverage, an injured employee may bring a civil lawsuit against his employer under general tort law—with one unusual twist. (§ 3706; *Huang v. L.A. Haute* (2003) 106 Cal.App.4th 284, 286.) Unlike a tort plaintiff who bears the burden of proving every element of a negligence claim, an employee suing his employer in this context only bears the burden of establishing that his injury "occurred in the course of [his] employment." (*Huang*, at p. 286.) Once he does so, section 3708 erects a presumption that "the injury to the employee was a direct result and grew out of the negligence of the employer," and it becomes the *employer's* burden to rebut that presumption. (§ 3708; *Huang*, at pp. 288-289.) As with any evidentiary challenge, we review the trial court's factual findings supporting its ruling for substantial evidence. (*Coffey*, *supra*, 60 Cal.4th at p. 1217.)

Here, there was ample evidence that plaintiff's arm was injured while seeking to eject a trespasser from the apartment complex, which he testified was one of his duties as manager. Although the owner presented evidence that plaintiff suffered the injury while working as a bouncer and/or as a furniture mover, the trial court disregarded that evidence and we may not gainsay that decision on appeal. (*Regalado v. Callaghan* (2016) 3

Cal.App.5th 582, 597 ["our task is not to reweigh the evidence"].) Upon plaintiff's showing, the statutory presumption took effect and it became the owner's burden to disprove negligence and causation. The owner presented evidence that he took steps to replace locks on the complex, but the trial court found the evidence to be less credible than plaintiff's evidence regarding the complex's general state of disrepair. As noted above, we cannot revisit that determination on appeal.

The owner assails the trial court's ruling from three sides. First, he argues that he adequately rebutted the presumption of negligence. Specifically, he argues that his evidence resoundingly defeated the necessary showing that it was "more probable than not" that a trespasser would attack plaintiff, as required by *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 775-776, *Penner v. Falk* (1984) 153 Cal.App.3d 858, 865-867, and *Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1213. The problem with this argument is that each of the cases the owner cites involve a landlord's duty *to a tenant* to protect against the intentional acts of third parties. By contrast, this case involves the much different relationship that exists between an employer and his employee who is injured in the course of his employment. Indeed, this relationship is so different that the employer's negligence is rebuttably presumed. As a result, *Saelzler*, *Penner*, and *Castaneda* are irrelevant and do not dictate a different result.

Second, the owner contends that the trial court erred in not allocating some of the responsibility for plaintiff's injury to the trespasser. The owner has forfeited this argument because the apportionment of causation and damages is an affirmative defense that is forfeited unless raised in the operative answer; here, it was not. (*Wilson v. Ritto* (2003) 105 Cal.App.4th 361, 369 [noting that "[a]pportionment of noneconomic damages" is an affirmative defense]; *Vitkievicz v. Valverde* (2012) 202 Cal.App.4th 1306, 1314 ["[t]he failure to assert an affirmative defense by demurrer or answer results in the . . . forfeiture of the defense"].) The owner asserts that he is excused from pleading apportionment as an affirmative defense because the facts underlying that defense (namely, that the trespasser swung at plaintiff) were already alleged in the complaint. The owner cites *Carlotto, Ltd. v. County of Ventura* (1975) 47 Cal.App.3d 931, 937, but that case dealt with the

computational issue of apportionment of *damages*, not the apportionment of *liability*. The owner's allegation that the trespasser should be held partially liable for plaintiff's injury is a "'new matter'" that is "'not responsive to an essential allegation in the complaint'"; as such, it is an affirmative defense that must be pled. (*Protect Our Benefits v. City and County of San Francisco* (2015) 235 Cal.App.4th 619, 638.) The owner's apportionment defense lacks merit in any event. The owner cites *Knight v. Jewett* (1992) 3 Cal.4th 296 and Civil Code section 1431.2. But *Knight* held that a jury could take into account a plaintiff's voluntary decision to engage in an unusually risky sport when applying the secondary assumption of risk doctrine (*Knight*, at pp. 313-314), and Civil Code section 1431.2 deals with the allocation of noneconomic damages between defendants in a lawsuit (Civ. Code, § 1431.2, subd. (a); *Weidenfeller v. Star & Garter* (1991) 1 Cal.App.4th 1, 8). Neither supports a reduction in damages against an employer presumed to be the negligent cause of an employee's injury.

Lastly, the owner asserts that he is entitled to reversal because the trial court did not rule on how much plaintiff contributed to his own injury when he reinjured himself moving the sofa. The owner is wrong. The court *did* rule on that issue, concluding that the owner's avoidable consequences/failure-to-mitigate argument was "without merit." Moreover, this ruling was correct because section 3708 provides that an employee's "contributory negligence" is "not a defense" to liability (§ 3708), and because "the doctrine of avoidable consequences, being an aspect of contributory negligence, does not apply" to claims brought in lieu of workers' compensation claims under section 3708 (*Thompson v. Workers' Comp. Appeals Bd.* (1994) 25 Cal.App.4th 1781, 1787-1788).

II. Plaintiff's Cross-Appeal

As noted above, section 1194 provides that "any employee receiving less than the legal minimum wage . . . *is entitled* to recover in a civil action the unpaid balance of the full amount of this minimum wage . . ., *including interest thereon*." (§ 1194, subd. (a), italics added.) Section 1194.2 contains identical language with respect to liquidated damages unless the employer acted reasonably and in good faith. (§ 1194.2, subds. (a) & (b).) Plaintiff argues that the trial court erred in not awarding him prejudgment interest

because these statutes mandate such an award. Because this claim requires us to construe these statutes, our review is de novo (*Nichols*, *supra*, 2 Cal.App.5th at pp. 611-612), and we—like other courts before us—agree with plaintiff. (*Espinoza v. Classic Pizza, Inc.* (2003) 114 Cal.App.4th 968, 975 ["[a]n employee who sues civilly to recover unpaid overtime is entitled to 'interest thereon'"].)

The owner raises two arguments in response. He asserts that sections 1194 and 1194.2 merely *authorize* the award of prejudgment interest, but do not *require* it. For support, he cites *Coastside Fishing Club v. California Fish & Game Com.* (2013) 215 Cal.App.4th 397, 425, for the proposition that "[t]he word 'shall' in a statute does not necessarily denote a mandatory requirement." *Coastside* is doubly irrelevant. Whether a requirement is "mandatory" (as opposed to "directory") affects whether or not the failure to comply with a statutorily prescribed procedural step will invalidate the governmental action to which it relates; it has nothing to do with whether the action is required or not. (*Morris v. County of Marin* (1977) 18 Cal.3d 901, 908.) Even if we were to take *Coastside's* definition of "shall" at face value, it contradicts the plain language of section 15 of the Labor Code, which provides that "'shall' is mandatory." (§ 15.) The owner additionally asserts that prejudgment interest is meant to be compensatory (*Cassinos v. Union Oil Co.* (1993) 14 Cal.App.4th 1770, 1790), such that an award of prejudgment interest *and* liquidated damages amounts to a duplicative recovery. However, *Cassinos* dealt with the discretionary award of prejudgment interest under Civil Code section 3288 (*Cassinos*, at p. 1790), where concerns about duplicative recovery may remain relevant. Where, as here, the award of prejudgment interest is mandated by statute, such considerations have already been weighed—and rejected—by our Legislature.

DISPOSITION

The judgment is to be modified to an award of prejudgment interest in the amount of $2,698.10 on each of the unpaid wages and liquidated damages counts. As modified, the judgment is affirmed. Plaintiff is entitled to his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST